No. 3550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. YOUNG,
Plaintiff in Error,

vs.

CALIFORNIA STATE BOARD OF PHARMACY, et al.,
Defendants in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM SEA, JR.,
Attorney for Plaintiff in Error.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Introduction.

In this closing brief we have endeavored to touch upon every matter brought out in the separate briefs of the defendants in error, with as little repetition as possible.

GOOD FAITH OF PLAINTIFF IN ERROR.

The plaintiff in error maintains that he and his counsel have acted with utmost good faith throughout this proceeding and that every step that has been taken has been with a proper view to redress

the wrong that has been done him when he and his former partner, C. F. McGinis, druggists of Mexico, were the foreign consignees of the goods in question, in having said goods, while they were in transitu in interstate and foreign commerce from the United States to Mexico, seized at Calexico, California, while in the hands of the duly and regularly licensed customhouse broker for the purpose of continuing the transit from the United States to Mexico, by the defendants in error, through Inspector Roy Jones, and in having criminal prosecutions brought against them for an alleged violation of the so-called Poison Law of California. Instead of bringing one criminal action, three were brought, each one involving a different class of the goods. The convictions in two cases in this State were reversed by the Supreme Court of the United States.

C. F. McGinis and E. E. Young v. People, etc., 247 U. S. 91;

C. F. McGinis and E. E. Young v. People, etc., 247 U. S. 95.

The result of those reversals was the acquittal of this plaintiff in error by a jury in one case and a dismissal by the prosecution of the second case against him and the dismissal of both cases by the prosecution against McGinis. The third action was dismissed for want of prosecution after a mistrial after the lapse of four years.

NO FINAL CONVICTION UNDER POISON LAW.

As has been shown, there was never a *final* conviction in any of these cases. Under the "Poison Law" it is provided in Section 8b, found at page 808 of the Penal Code of California:

> "All such narcotic drugs, pipes used for smoking opium (commonly known as opium pipes) or the usual attachments thereto, and all such hemp seized under the provisions of this act shall be ordered destroyed by the judge of the court in which *final* conviction was had; said order of destruction shall contain the name of the party charged with the duty of destruction as herein required; provided, however, that the judge shall turn all such evidence over to the California state board of pharmacy for such destruction; and provided, further, that the board of pharmacy may dispose of all narcotics now on hand or hereafter coming into their possession (other than smoking opium) either by gift to the medical director of California state prisons or state hospitals or by sale to wholesale druggists, the funds received from such sales to be applied by the board of pharmacy to the carrying out of the provisions of this act or of the act creating such California state board of pharmacy." (Italics ours.)

But the board of pharmacy got possession of the goods, and that possession is admitted by the demurrer.

The prosecutions came to an end on June 10, 1919, but that was not sufficient for the defendants in error. They have persistently refused to comply with the demands of plaintiff in error to restore the goods to that commerce which was interupted

by the seizure. Why? Has some one become involved in an unlawful traffic in these goods? An answer may become a shadow of the future or a ghost of the past.

Has the time come when a "board" under our state government can set itself up as an autocrat, adopting the rule of "might makes right", and absolutely refusing to do justice, and finally when it and the persons composing it are brought into a United States court pleading that the State itself is being sued.

STATE NOT A PARTY.

The trial court correctly disposed of this in its opinion (Supp. Tr. p. 20). Yet the defendants in error still maintain the board's brief that this ruling was wrong. They did not sue out a writ of error.

Under the law the board could sell the goods and retain the proceeds. Such proceeds would not be state funds used for governmental purposes by appropriation of the legislature. The state has no proprietary interest in such funds. The law provides for the retention of the funds itself. How can the board claim immunity in this matter, when, having the goods, it wrongfully refuses to deliver them? The board is not above the law. The claim that this is a suit against the state is but to camouflage the issue. Upon such a state of facts as appears in this case, all principles of law would

be wiped out to hold that such a board could hide behind the sovereignty of the state. The making of a state board a party to a suit does not make the state a party, although its law may have prompted its action. The appearance of the attorney general for the board in this case does not make the suit one against the state.

Davis v. Gray, 16 Wall. 203.

In deciding who are parties to the suit, the court will not look beyond the record.

Osborn v. Bk. of U. S., 9 Wheat. 738.

PHARMACY BOARD A CITIZEN OF CALIFORNIA.

It is alleged that the board is a citizen of California. This defendant in error is an existing entity in the State of California, just as much as any natural person, or a corporation created by the State of California or a municipal corporation also so created. For jurisdictional purposes all the above classes are citizens.

Any recovery had in this action against the defendant board or against the defendants as members would not be payable out of the public funds of the state. The funds of the board are not used for governmental purposes. The funds of the board are not subject to appropriation by the legislature. A portion of the fines collected under the Poison Act are paid into this fund. The salary and expenses of the members of the board are paid from this fund.

In this action the members are sued also individually and the defendant, Off, has appeared and demurred individually.

POISON ACT UNCONSTITUTIONAL.

Under the state of facts set forth in this record, it has been admitted by the defendants in error by their demurrers that the goods were *in transitu* in interstate and foreign commerce. The attorney general contends that the plaintiff in error had no right to the possession of the goods unless it affirmatively appeared that he came within some exception mentioned in the Poison Act. A foreign consignee does not come within the act, yet such a contention on the part of the attorney general clearly makes that act unconstitutional and void as applying that act to foreign shipments.

AFFIDAVIT OF LOUIS ZEH.

Answering the briefs as to the affidavit of Louis Zeh standing uncontradicted. The injunction suit was commenced, but was never tried on the merits. The case is not controlling. The action in replevin was commenced, but was never tried on the merits. The case is not controlling. There was never a final determination in either case by which plaintiff in error would be bound by a finding as to any particular fact as to date of conversion. If there had

been a trial on the merits the court *could* have found a different date than that alleged, so that the allegation would not have been binding on the pleader. It is well settled law that a plaintiff may amend his complaint to conform to the proofs. Therefore, we are not bound by any dates set up in those two cases. In any case, is it bad faith to amend a complaint?

If defendants' contention that there is no cause of action set forth in this action is correct, then certainly there was no cause of action set forth in the replevin action above mentioned. Again that case is not controlling. Both actions were disposed of on demurrer.

Is it not possible that a party may make a demand at a particular time, yet for some reason that demand was premature? No dates in any of these actions have been finally determined by a trial on the merits.

CONCLUSION.

If we are allowed to amend, we will plead the fact that at the commencement of this action, the plaintiff in error *was* a citizen of the State of Arizona at the time of the commencement of this action, and prove it on the trial. This court may send the case back to the trial court so that that amendment may be made.

Menard v. Goggan, 121 U. S. 253.

Also, there can be an amendment that the possession of the defendants was unlawful and illegal at the time of making of the demands. Also that the defendants converted the goods to their own use.

We should have been given an opportunity to meet the objections of the defendants, as there is sufficient facts in the whole record of the case to show that the plaintiff can amend.

Dated, San Francisco,
February 9, 1921.

Respectfully submitted,
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